VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
v.	)	CRIMINAL NO. 102888
	)	
LEE BOYD MALVO	)	

RESPONSE TO MOTION TO REQUIRE THE COMMONWEALTH TO PROVIDE AN ACCOUNTING OF ALL EXPENDITURES AND COMMITMENT FOR EXPENDITURES MADE FOR INVESTIGATION AND TRIAL PREPARATION BY ALL STATE AND FEDERAL AGENCIES PARTICIPATING IN THIS PROSECUTION INCLUDING THE DEPARTMENT OF JUSTICE

Comes now the Commonwealth in response to the motion to require the Commonwealth to provide an accounting and asks that the motion be denied. There is positively no authority for it either in case law, statutes, or the rules of court. Neither the due process clauses nor the equal protection clause of the United States Constitution can be said to be authority for such a motion. Article 1, section 8 of the Constitution of Virginia clearly does not support it. Thus it comes as no surprise that not a single case is cited. The vague claim that the motion is pursuant to the Fifth and Fourteenth Amendments simply does not withstand constitutional scrutiny.

I. INACCURACIES

First of all, the motion contains a number of factual and legal inaccuracies. Paragraph 1 of the motion incorrectly states that "the Court is limited by the provisions of Virginia law as to what experts and specialists can be funded." Virginia law is "limited" only if one believes that refusing unreasonable or inappropriate expenses can be considered a limiting provision. Section 19.2-163 of the Code of Virginia authorizes a trial court "to direct the payment of such reasonable expenses incurred by... [a] court appointed attorney as it deems appropriate under the circumstances of the case." It is hard to believe that somehow the refusal of Virginia to authorize "unreasonable" and "inappropriate" expenses in a given case runs afoul of the Fifth

and Fourteenth amendments. As was said in Singleton v. Commonwealth, 16 Va. App. at page 842:

> "Reasonableness addresses the amount of the expense. A trial court is not permitted to direct payment of such an expense if it is of an unreasonable amount.
>
> Appropriateness addresses whether the purpose of the expense is suitable for the particular case. An expense would not be justified, even if reasonable in amount, if it served little or no purpose in the particular case."

Paragraphs 2 and 3 of the motion state, among other things, that the prosecution has received federal funding. To the best of the knowledge of the undersigned, this prosecution has not received a nickel in federal funds. [That is not to say we are not going to ask for some. In order to reduce the cost of this case to the Virginia taxpayer, federal funds will be sought to reduce witness costs and the other expenses of trial.]

The suggestion in Paragraph 6 of the motion that the defendant is being prosecuted by both the federal government and the Commonwealth of Virginia is semantical nonsense. He is being prosecuted by the Commonwealth of Virginia in this court. The witnesses will be called by the Commonwealth, examined by the Commonwealth and the case will be argued by representatives of the Commonwealth's Attorney's office. Using an FBI fingerprint expert in a state bank robbery case, or an ATF chemist in a Virginia drug sale does not make those cases a federal prosecution. This is a Virginia capital murder case, under Virginia law, and is to be tried in a Virginia courtroom. No federal prosecutors will participate.

II. CONSTITUTIONAL QUESTIONS

It is when one gets to paragraph 7 of the motion that one discovers what the motion is all about. Since the Court has made it clear that provisions will be made for the transportation, feeding, and housing of defense witnesses, it becomes obvious that the defense is unhappy with the court orders dealing with experts and investigation expenses. This is an unhappiness with the same Court that has provided to the defense four lawyers, a mental health expert, a DNA expert,

a ballistics expert, a handwriting expert, and two and one-half months of work from three private investigators. It is the position of the Commonwealth that the Court has fully complied with any constitutional requirements in this regard. Any civil suit in federal court asking for expert and investigation funds would simply be an attempt to subvert the rulings of this court.

As was said in U.S. v. Hartsell, et al., 123 F.3d 343 (1997) at page 349:

> "The Supreme Court has made clear that a defendant does not have the right to public funding for all possibly helpful avenues of investigation or all possibly useful expert services, but only to the level of support required by the Due Process Clause. *Ross v. Moffitt*, 417 U.S. 600, 616 (1974). The Court delineated the scope of an indigent defendant's due process right to public funds to help present a defense, stating that the government has no duty to 'duplicate the legal arsenal that may be privately retained ...[but must] assure the indigent defendant an adequate opportunity to present his claims fairly.' Id."

Four lawyers, five experts, and two and one-half months of private investigative work would seem to be more than enough to provide this defendant "an adequate opportunity to present his claims fairly." Neither the Fifth nor the Fourteenth amendment requires more. The Virginia Supreme Court, in Husske v. Commonwealth, 252 Va. 203, 211 (1996), put it this way, "This due process requirement, however, does not confer a right upon an indigent defendant to receive, at the Commonwealth's expense, all assistance that a non-indigent defendant may purchase. Rather, the Due Process Clause merely requires that the defendant may not be denied "an adequate opportunity to present [his] claims fairly within the adversary system." Citing Ross v. Moffitt, supra.

Supposedly, the reason for this motion is so that the defendant can present a demand to some unnamed federal funding authority. The demand will be made pursuant to some undisclosed legal authority. It is hard to tell whether we are dealing with a United States Court of Claims case or a budding congressional lobbying effort. Whatever it is, it has no place in a criminal case. One searches in vain for a Virginia statute, a federal statute, a Virginia case, a

federal case, or any Rule of the Supreme Court of Virginia, which would support this motion. None are found because there are none.

We respectfully ask the Court to deny the motion.

Respectfully submitted,

ROBERT F. HORAN, JR.
Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Commonwealth's Response was mailed, postage prepaid, to Michael Arif, Counsel for Defendant, 8001 Braddock Road, # 105, Springfield, Virginia 22151, and Craig Cooley, Counsel for the Defendant, 3000 Idlewood Avenue, P.O. Box 7268, Richmond, Virginia 23221, this 8th day of August, 2003.

ROBERT F. HORAN, JR.
Commonwealth's Attorney